

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)
and STATE OF NEBRASKA,) 8:08CV293
)
Plaintiffs,)
) MEMORANDUM AND ORDER
v.)
)
PECKHAM, INC., et. al.,)
)
Defendants.)

The plaintiffs have filed a motion to strike the defendants' jury demand on the issue of civil penalties. Filing No. [98](#). Citing [Tull v. United States, 481 U.S. 412 \(1987\)](#), the plaintiffs claim "there is neither a statutory nor a Constitutional right to a jury trial for the determination of civil penalties for violations of the Clean Water Act." Filing No. [99](#), at CM/ECF p. 1.

Pursuant to [33 U.S.C. § 1319\(d\)](#) of the Clean Water Act, the "court" determines the amount of any civil penalty imposed based on the factors listed in the statute. Upon review of the legislative history, [Tull](#) held that "Congress intended that trial judges perform the highly discretionary calculations necessary to award civil penalties after liability is found." [Tull, 481 U.S. at 425](#). [Tull](#) further held that the Seventh Amendment guarantees the right to have a jury decide the issue of liability when the government seeks civil penalties under the Clean Water Act, but the Seventh Amendment does not afford the right to a jury trial on the amount of any penalty assessed. "[T]he trial court and not the jury should determine the amount of penalty, if any." [Tull, 481 U.S. at 427](#). Although the "Defendants submit that the [Tull](#) case goes against prior U S Supreme Court precedent and is in fact an aberration which may be reversed by the current court,"

(filing no. [106](#), at CM/ECF p. 3), as to the issue raised by the plaintiffs' motion, Tull is controlling and this court cannot ignore, disregard, or contradict its holding. Accordingly,

IT IS ORDERED that the defendants are not entitled to a jury trial regarding the amount of civil penalties owed by the defendants, if any, and the plaintiffs' motion to strike the defendants' request for a jury trial on that issue, (filing no. [98](#)), is granted.

DATED this 29th day of September, 2009.

BY THE COURT:

Richard G. Kopf
United States District Judge